

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION**

**IN RE: BLUE CROSS BLUE SHIELD
ANTITRUST LITIGATION
(MDL No. 2406)**

Master File No. 2:13-CV-20000-RDP

This document relates to Provider-track cases.

BLUES' SUBMISSION IN CONNECTION WITH PROVIDER PLAINTIFFS' MOTION TO DISQUALIFY CYRIL SMITH AND FOR CORRECTIVE NOTICE

The Blues respectfully make two points with respect to Subscriber class counsel Cyril Smith's solicitation of potential opt-outs from the pending Provider Settlement.

First, Mr. Smith's January 24 submission (Dkt. 3244) ignores his ongoing obligations to the Subscriber class. As the Blues have explained to the Court, the Provider Settlement very intentionally contains relief that is good for Providers and—importantly—good for members, *including the Subscribers* Mr. Smith continues to represent. (*See* Dkt. 3216 (Nov. 14, 2024 Provider Preliminary Approval Hearing Tr.) at 80:7-10.) For example, the Provider Settlement includes numerous improvements to the BlueCard Program that will increase Settlement Class Members' access to important member information, improve transparency with respect to member claims, and speed up resolution of member-claim issues. (*See* Dkt. 3192-02 (Provider Settlement Agreement) at ¶¶ 14-16, 18-20.) By disparaging the Provider Settlement and encouraging providers

to opt out, Mr. Smith is acting against the interests of his own Subscriber clients who will benefit from the Provider Settlement's substantial injunctive relief.¹

Second, any representation by Mr. Smith of a provider opt-out (if permitted) would inevitably implicate his obligations under the MDL Protective Order (Dkt. 550). For more than a decade, Mr. Smith agreed to serve as a Court-appointed member of the Subscriber Plaintiffs' Steering Committee and the Subscriber Settlement Committee (*see* Dkt. 61; Dkt. 62-1; Dkt. 82), and in that Subscriber capacity received the Blues' (as well as Providers' and numerous non-parties') confidential information. The MDL Protective Order mandates that any information produced in the MDL "shall be used *solely* for the purpose of prosecuting or defending *this Proceeding* . . . and for no other purpose whatsoever".² (Dkt. 550 at ¶ 2 (emphasis added).) It is implausible to assume that Mr. Smith will be able to cognitively suppress his knowledge of voluminous confidential MDL information while also zealously representing one or more provider opt-outs. Indeed, courts routinely recognize that "[i]t is very difficult for the human mind to compartmentalize and selectively suppress information once learned, no matter how well-intentioned the effort may be to do so." *In re Deutsche Bank Trust Co. Americas*, 605 F.3d 1373, 1378 (Fed. Cir. 2010); *accord Fed. Trade Comm'n v. Advoc. Health Care Network*, 162 F. Supp. 3d 666, 670 (N.D. Ill. 2016) ("The inescapable reality is that once . . . a lawyer . . . learns the confidential information that is being sought, that individual

¹ At this stage, the Blues express no view on whether the Boies Schiller Flexner firm has a conflict in *A4* (*see* Dkt. 3243). That issue is not part of Providers' motion and should not be answered on an advisory basis.

² This obligation, of course, survives the Subscriber Settlement and remains today. (*See* Dkt. 550 at ¶ 23 ("Any Confidential Material or any information contained in or derived from Confidential Material shall be subject to the provisions of this Protective Order until further Order of this court.").)

cannot rid himself of the knowledge he has gained; he cannot perform a prefrontal lobotomy on himself[.]”); *Intel Corp. v. VIA Techs., Inc.*, 198 F.R.D. 525, 531 (N.D. Cal. 2000) (“good intentions are insufficient to prevent inadvertent disclosure of confidential information because it is not possible for counsel to ‘lock-up trade secrets in [her] mind’”); *Motorola, Inc. v. Interdigital Tech. Corp.*, No. CIV.A. 93-488-LON, 1994 WL 16189689, at *5 (D. Del. Dec. 19, 1994) (“The level of introspection that would be required is simply too much to expect, no matter how intelligent, dedicated, or ethical the . . . attorney[] may be.”).

Dated: January 31, 2025

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I hereby certify that on January 31, 2025, the foregoing was electronically filed with the Clerk of Court using the CM/ECF system, which will send notification of such filing to all counsel of record.

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